BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In support of the foregoing Petition for Certiorari, the following Brief is respectfully submitted:

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 143 Fed. (2d) 268 (Advance Sheets).

For ready reference, the decisions and orders of the National Labor Relations Board involved in the Court action (R. 2 and R. 95) will be found reported in XXXVIII N. L. R. B. 1210 and XLVII N. L. R. B. 1055.

BASIS OF JURISDICTION AND STATUTE INVOLVED.

Jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347 (a); under Section 10 (e) of the National Labor Relations Act as amended (Act of July 5, 1935, C. 372; 49 Stat. 453; 29 U. S. C. A. 160); and under Rule 38, Sect. 5, subsection (b) of this Court.

The Statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935, C. 372; 49 Stat. 449; amended June 25, 1936, C. 804; 49 Stat. 1921; 29 U. S. C. A. 151, etc.) the pertinent excerpts from which are set forth in the appendix annexed to the Petition.

The decree of the Circuit Court of Appeals for the Third Circuit, now sought to be reviewed, was entered on July 5, 1944 and was final in form and effect. Petitioner has filed a motion to stay the enforcement of the decree upon which an order was entered staying the same for the period in which a Petition for Certiorari could be filed.

STATEMENT OF THE CASE.

The first question involved in this proceeding is whether the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151, referred to herein as "the Act") applies to a local retail department store.

The second question is whether an employer is prohibited under the Act from posting a notice in connection with the notice required by the National Labor Relations Board, advising the employees that they may join any Union they wish to join and that membership will not affect their positions and further that it is not necessary for them to join, since no law requires them to do so; and calling attention to twenty-five years happy relationship of confidence and understanding.

The third question involved is whether an employer, in addition to being required to withhold recognition, may be ordered to "disestablish" an unaffiliated Association where it has not been found that he controls or dominates it but that only he aided it and was unneutral as between it and another Union.

On July 31, 1941 the National Labor Relations Board filed its complaint against the Employer, Petitioner (R. 87) charging it with certain alleged unfair labor practices and alleging that the Employer was engaged in interstate commerce within the meaning of the Act.

On June 11, 1942 the Board filed a Complaint (R. 279) against the Employer again charging that it was engaged in interstate commerce and that it had committed unfair labor practices in posting notices and in dominating and interfering with the formation of an unaffiliated Association. The Answers of the Employer (R. 91 and R. 286) both denied that it is engaged in interstate commerce within the meaning of the Act and denied the charges.

In its findings of fact, the National Labor Relations Board (herein called "the Board") (R. 97) describes the Respondent as having its principal office and place of business in Atlantic City, New Jersey, where it conducts a re-

tail department store business for the "purchase, sale, and distribution of general merchandise, including household furnishings and equipment, wearing apparel, notions, cosmetics, and other commodities. During 1941, the Respondent's wholesale purchases of merchandise for the operation of its business totalled $1,530,842. Approximately ninety-five per cent of such merchandise was acquired by and shipped to the Respondent from points outside the State of New Jersey. In this period, the Respondent's gross sales amounted to $2,332,292. Included in these sales was merchandise in the amount of $16,326, which was shipped by the Respondent to points outside the State of New Jersey." The percentage of total sales so shipped out of New Jersey is 0.7 of 1 per cent. For the year 1940 the Board had found figures for such out of State deliveries amounting to 0.7 of 1 per cent. of the total sales (R. 4).

Long after the decision and order of the Board which was filed February 14, 1942 (R. 2), and considerably after the decision and order filed February 26, 1943 (R. 95), namely, on October 7, 1943, the Board filed its Petitions in the Circuit Court of Appeals for the Third Circuit for enforcement of those Orders. The Employer, Petitioner, filed Answers denying that it was engaged in commerce within the meaning of the Act and otherwise denying the charges.

The Court, in an opinion filed June 9, 1944, by Circuit Court Judge Biggs, held that the Employer was subject to the Act and that thereunder the Employer was prohibited from posting the notices referred to above and found that the Employer was to "disestablish" the Association.

The Court states in its opinion:

> "The respondent contends that it is not subject to the Act because whatever goods are shipped to it for retail sale come to 'complete rest' and cease being in the stream of interstate commerce upon delivery to it. We dealt with a substantially similar contention in *National Labor Relations Board v. Poultrymen's Serv-*

ice Corporation, 138 F. (2d) 204, and found it to be without merit. We adhere now to this ruling."

On July 5, 1944, a final decree was entered by the Court in accordance with the opinion.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that a local retail department store, conducting over the counter sales, of goods on its shelves, wholly within the confines of one City and one State, is nevertheless subject to the provisions of the National Labor Relations Act, either as being engaged in interstate commerce or in activities substantially affecting interstate commerce or burdening or obstructing the same or the free flow thereof.

2. In holding that the local character of such retail store is affected for the purpose of the application of the Act, by the fact that the greater portion of the goods on its shelves originally were purchased by it from sources outside of the State.

3. In holding that an employer is prevented by the Act from posting notices to employees calling their attention to their legal rights with reference to joining or not joining a Union.

4. In holding that an employer, in addition to being ordered to withhold recognition, can be ordered to disestablish an Association which he never recognized, never dealt with and which he does not control.

ARGUMENT.

A. The Interstate Commerce Question.

The decision to the effect that the Petitioner's business, consisting of one retail store in Atlantic City, New Jersey, is subject to the Act, would logically mean that practically every retail store, be it large or small—in every hamlet and on every by-road—is subject to Federal control. This would result from the contention that Congress, by using in its legislation, the words "interstate commerce" or "affecting or burdening or obstructing or interfering with the free flow of interstate commerce" could control what has been assumed to be a purely local intrastate operation. This would all result from the contention that the fact that the goods sold and delivered locally were originally produced in another State or were purchased by the retail dealer in another State before he placed them upon his shelves.

It is the conclusion of the Circuit Court in this case, based upon its prior decision in *National Labor Relations Board v. Poultrymen's Service Corporation*, 138 F. (2d) 204, and other decisions by the same Court referred to in its opinion, that that factor is sufficient to bring the retailer within the control of the Act.

I. In so Deciding the Circuit Court Appears to be in Conflict With the Holdings of Other Circuit Courts of Appeals.

In *Consolidated Edison Company v. National Labor Relations Board*, CCA (2), 95 F. (2d) 390, 393, affirmed 305 U. S. 197, 83 L. Ed. 126, 59 S. C. 206, the Circuit Court of the Second Circuit states:

> "Consistently with these principles it can scarcely be doubted that the *labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside the state or some of his local customers are*

> *engaged in interstate commerce.* In such a case the closing of the merchant's store by a strike of his employees would undoubtedly affect interstate commerce, but *the effects would be too remote and indirect to bring his activities within the range of federal regulation.* * * *" (Emphasis supplied.)

The Circuit Court for the Fourth Circuit, in the case of *National Labor Relations Board v. White Swan Company*, CCA (4) 118 F. (2d) 1002, in dealing with the operation of a laundry in Wheeling, West Virginia, states in part:

> "While certain of its supplies are obtained from without the state, the volume of the interstate business thus involved is not sufficient, in our opinion, to bring the business within the jurisdiction of the Board. The record shows that these supplies consist of soap, bluing, bleach, solvent, coal, water, paper, tape and padding, and that respondent's purchases thereof during 1938 amounted to $38,333.15, of which $10,810.90 came from without the state. Respondent, however, operates delivery trucks in Ohio as well as in West Virginia, three of the delivery routes from its plants being in Ohio and eleven in West Virginia. The business involved is necessarily of a purely local character, as the record shows that a radius of fifteen miles is the practical limit for a laundry or dry cleaning business in this territory. The fact that business is done in Ohio, outside the state in which respondent's laundry is located, results from the fact that this purely local business is located in a city on a state line. Respondent transports garments in its trucks from those of its customers who reside in Ohio to its plant in West Virginia to be serviced, and then after servicing returns the garments in its trucks to the customers."

The same Circuit Court in the case of *Schroepfer v. A. S. Abell*, CCA (4), 138 F. (2d) 111, also stated more recently:

"A sausage manufacturer who sells his product intrastate would hardly be said to be engaged in interstate commerce with respect to such intrastate sales *merely because he purchases the materials that go into the sausages in interstate commerce.*

"The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce." (Emphasis supplied.)

In the case of *Jax Beer Co. v. Redfern*, CCA (5), 124 F. (2d) 172, the Circuit Court for the Fifth Circuit held that the local sale of beer is intrastate commerce even though the beer was received from without the State and stored in a warehouse.

It has frequently been held that ordinary retail businesses are not in interstate commerce and are not engaged in activities which affect interstate commerce.

The Circuit Court for the Sixth Circuit in *Allesandro v. C. F. Smith Company*, CCA (6), 136 F. (2d) 75, in an action involving a chain of grocery stores within the State of Michigan, held that it was not engaged in interstate commerce and stated:

"The sole business of the Smith Company is retailing and its warehousing of merchandise without other purpose than to provide for necessary and economical distribution of merchandise to its stores for sale at retail.

"* * * The Smith business is a retail business, its goods are acquired by a local merchant for local disposition and differ not at all from those of the corner grocery except in volume and perhaps in selling price."

In *Walling v. Mutual Wholesale Food & Supply Co.*, CCA (8), 141 F. (2d) 331 (Syllabus 16), the Court rejects the principle that goods bought interstate for resale intrastate gives the resale an interstate commerce character.

The Circuit Court of Appeals for the Seventh Circuit in *Walling v. Goldblatt Bros., Inc.*, CCA (7), 128 F. (2d) 778 (Cert. den.), 318 U. S. 757, 87 L. Ed. 1130, 63 S. C. 528, in a case involving the operation of several department stores and warehouses, *operating in two States*, the Court said:

> "Here, once the goods reached the warehouses, they assumed a wholly local character. The function of the warehouses was to furnish activities and means for the conduct of a relatively local retail business conducted by one company. This function was that of an ordinary warehouse for a retail establishment and bears no resemblance to a 'throat' or a 'current of commerce.' Upon delivery to the warehouse, interstate commerce ceased. Schechter Corp. v. United States, 295 U. S. 495; Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 964; Winslow v. Federal Trade Commission, 277 Fed. 206, 209 (C. C. A. 4), cert. denied 258 U. S. 618; Atlantic C. L. R. R. v. Standard Oil Co., 275 U. S. 257, 267.
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> "Where orders are solicited within a state and the goods are shipped from without the state directly to the customer or to an agent for delivery to the customer the transactions are a part of interstate commerce until the goods reach the customer. Jewel Tea Co. v. Williams, 118 F. (2d) 202, 206 (C. C. A. 10), and cases there cited; Binderup v. Pathe Exchange, Inc., 263 U. S. 291; Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U. S. 52. But here there were no such prior orders. * * * The mere fact that an anticipated local transaction causes movement in interstate commerce is not sufficient to constitute the wholly local transaction after arrival a part of commerce. Jewel Tea Co. v. Williams, 118 F. (2d) 202, 207 (C. C. A. 10), and cases there cited; Lipson v. Socony Vacuum, 87 F. (2d) 265, 267 (C. C. A. 5). Where goods are delivered to the buyer to be sold

later and delivered to intrastate buyers subsequent acts are not commerce. Jax Beer Co. v. Redfern, 124 F. (2d) 172, 174 (C. C. A. 5); Swift & Co. v. Wilkerson, 124 F. (2d) 176 (C. C. A. 5); Jewel Tea Co. v. Williams, 118 F. (2d) 202 (C. C. A. 10); Gerdert v. Certified Poultry & Egg Co., 38 F. Supp. 689; Klotz v. Ippolito, 40 F. Supp. 422; Foster v. National Biscuit Co., 31 F. Supp. 552; Lipson v. Socony Vacuum, 87 F. (2d) 265 (C. C. A. 3); Atlantic Coastline R. R. v. Standard Oil, 275 U. S. 257; Winslow v. Federal Trade Commission, 277 Fed. 206; Fleming v. Arsenal Bldg. Co., 38 F. Supp. 207; Rauhoff v. Gramling & Co., 42 F. Supp. 754."

To the same effect is the case in the Tenth Circuit of *Jewel Tea Co. v. Williams*, CCA (10), 118 F. (2d) 202, and the case in the First Circuit of *Lipson v. Socony Vacuum Corp.*, CCA (1), 87 F. (2d) 265.

II. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been Settled But Should Be Settled by the Supreme Court.

The countless cases in which the Act would apply if the order of the Court below is allowed to stand and the national interest therein and sweeping effect thereof has already been pointed out in the Petition and in this Brief, and it is felt that no further elaboration is needed.

III. The Circuit Court Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of the Supreme Court.

It is the Petitioner's contention that the Circuit Court's order and the reasons given in its opinion, based upon the prior decisions by the same Circuit Court, are contrary to the established legal principles heretofore enunciated by this Honorable Court, not only under cases involving the Act, but under various other Statutes and

constructions of the interstate commerce clause of the Constitution.

In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893, 57 S. C. 615, this Court passed upon the constitutionality of the Act. It used very significant language to show that the Act was limited in its scope to the domain of interstate commerce and of matters affecting it and it therefore was not intended by Congress to break those bounds. On that ground it was held constitutional. Its language is as follows:

> "* * * The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of a State. That *distinction* between *what is national* and *what is local* in the activities of commerce is vital to the maintenance of our Federal system. * * *
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> "*The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers.* Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. * * *
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> "Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Again, in *Washington, Virginia & Maryland Coach Company v. National Labor Relations Board*, 301 U. S. 142, 81 L. Ed. 965, 57 S. C. 648, this Court stated:

> "The contention that the act on its face seeks to regulate labor relations in all employments, whether in interstate commerce or not, is plainly untenable. As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power."

In *Consolidated Edison Company v. National Labor Relations Board*, CCA (2), 95 F. (2d) 390, affirmed 305 U. S. 197, 83 L. Ed. 126, 59 S. C. 206, the Circuit Court stated:

> "It can scarcely be doubted that the labor disputes of a local merchant will not normally fall within the Board's jurisdiction, even though some part of his stock in trade originates outside of the State, or some of his local customers are engaged in interstate commerce."

In affirming, the Supreme Court stated:

> "In the present instance we may lay on one side, as did the Circuit Court of Appeals, the mere purchases by the utilities of the supplies, of oil, coal, etc., although very large, which come from without the State and are consumed in the generation and distribution of electric energy and gas."

In an earlier case, *Hopkins v. United States*, 171 U. S. 678, 43 L. Ed. 290, 19 S. C. 40, the question was whether the commission merchants on the Kansas City livestock market were subject to the Federal Anti-Trust Act. This Court stated:

> "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the

sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affects interstate commerce at all, does so only in an indirect and incidental manner?

"* * * *The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories.* * * *

"The character of the business of defendants must, in this case, be determined by the facts occurring at that city." (Emphasis supplied.)

Various decisions by this Court have indicated that the fact that a local dealer or retailer acquires his stock from out of the State does not render his retail business, an operation engaged in interstate commerce. In addition to the above cases, see *Walling v. Jacksonville Paper Company,* 317 U. S. 564, 87 L. Ed. 460, 63 S. C. 332, wherein the Court states:

"Hence we cannot conclude that all phases of a wholesale business selling intrastate are covered by the act solely because it makes its purchases interstate."

In the case of *A. L. A. Schechter Poultry Corporation v. United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. C. 837, passing upon the constitutionality of the National Recovery Act, which by its terms applied to all transactions "affecting interstate or foreign commerce", this Court held that the operation of a poultry slaughtering and selling business in Brooklyn did not bring the employees within the Act or the sales within interstate commerce but that all of those transactions were merely local matters, whether or not the poultry originated in another State. This Court stated:

"The mere fact that there may be a constant flow of commodities into a State does not mean that the flow

continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the State. *It was not held, used or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other States.* * * *" (Emphasis supplied.)

And, in discussing the effect of the operations upon interstate commerce, this Court said:

"In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. * * *

"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control. * * *

But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among several States' and the internal concerns of a State. * * *"

In his concurring opinion, Mr. Justice Cardozo stated:

"The law is not indifferent to considerations of degree. Activities local in their immediacy do not

become interstate and national because of distant repercussions. * * *

"To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our Federal system."

When we come to consider activities in the light of their effect on interstate commerce, it is clear that they must be *direct, immediate* and *substantial.*

In *Santa Cruz Fruit Packing Company v. National Labor Relations Board,* 303 U. S. 453, 466, 82 L. Ed. 954, 58 S. C. 656, this Court stated:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* * * * 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' "

In *McLeod v. Threlkeld,* 319 U. S. 491, 87 L. Ed. 1538, 63 S. C. 1248, this Court, through Mr. Justice Reed, made this significant comment:

"So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, *while those employees who handle goods after acquisition by a merchant for general local disposition are not.* (Emphasis supplied.)

IV. Application of Maxim De Minimis to the Insignificant Sales Resulting in Delivery to Other States.

Neither the Board nor the Court below seem to have relied upon the comparatively few deliveries to other States and therefore no extended argument will be made. The undisputed facts as found by the Board itself (R. 4 and R.

97) are that the percentage of sales resulting in shipment out of the State of New Jersey is 0.7 of 1% of the total sales in dollars and cents. Obviously this slight percentage should, for the purposes of this case, be entirely disregarded on the principle of de minimis and the case considered as though no deliveries were made out of New Jersey.

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. C. 668, 83 L. Ed. 1014, wherein this Court specifically indicated (Syllabus 9) that the maxim de minimis would apply to the Act. Obviously the Petitioner's business was not to ship out of the State and the few sales that were made for that purpose were most likely made to a person locally who desired a gift sent to some one or possibly as a result of incidental replacement or duplication of a prior purchase.

B. 1. The Decision of the Circuit Court of Appeals Holding That the Petitioner Committed an Unfair Labor Practice in Posting the Additional Notices is in Conflict With the Holdings of Other Circuit Courts of Appeals on the Same Subject.

Outside of the question as to whether or not the Association was dominated or aided by the Employer Petitioner, (which question is not before this Court) although vigorously disputed both by the Petitioner and the Association itself, in the Court below, the question that remains is whether the Petitioner committed an unfair labor practice in posting the two notices, in connection with and alongside of the notice which the Board stipulated to be posted and which was posted.

The facts concerning those notices which were found by the Board and on the basis of which the matter was argued in the Court below, are set forth in the Decision and Order of the Board, Case No. C-2371 (R. 95) and appears thereafter (R. 98) as follows:

> "On March 18, 1942, the respondent posted two notices, side by side, on the bulletin board of the store.

One of the notices appeared to be in substantial compliance with the terms of the Board's order."
This notice read in full as follows:

"Notice to Employees

"This Company will not in any manner interfere, restrain or coerce its employees in the exercise of right of self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other manual (sic) aid or protection, as guaranteed by Section 7 of the National Labor Relations Act, nor will this Company discourage membership in Retail Clerks International Protective Association Local No. 1358, affiliated with the American Federation of Labor, or any other labor organization of its employees by discriminating in regard to hire and tenure of employment or term or condition thereof.

"This Company has offered immediate and full reinstatement, to their former or substantially equivalent positions, to employees alleged to have been discriminatorily discharged, without prejudice to their seniority and other rights and privileges, and have made payment of the wages each of them would normally have earned from the date of the discharge to the date of the offer of reinstatement less his or her net earnings during that period.

M. E. Blatt Co."

The other read in full as follows:

"To the Employees of the Company:

"Due to recent rulings regarding the National Labor Relations Act, employees may be approached by representatives of one or more labor organizations to solicit their membership. Under these circumstances, we feel that our employees have a right to a statement of our attitude with reference to this matter.

"We recognize the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires, or is intended to compel, you to pay dues to any organization.

"For the last twenty-five years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other. Employees may continue to deal directly with us or with the head of their respective department as they have in the past regarding matters affecting their interests. We believe that our interests in this business are mutual and can best be promoted through confidence and cooperation.

M. E. BLATT COMPANY"

and (R. 105) as follows:

"Sometime on April 3, the respondent posted the following notice:

"TO OUR EMPLOYEES:

"It has come to our attention that a group of our employees have met to form an organization for the purppose of collective bargaining and we wish to repeat that it is not necessary for any employee to join any organization or to pay dues to any organization in order to continue in our employ.

M. E. BLATT CO."

It was the theory of the Board followed by the Circuit Court that the latter two notices, notwithstanding that they were posted side by side with a notice designated by the Board, constituted an unfair labor practice because it was (R. 100) "A campaign appeal by the Respondent toward

defeating the efforts of the Union". Further (R. 100) the Board stated:

> "The fact that the notice, in part, also indicated that union membership would not jeopardize the job security of employees, and that the accompanying notice posted by direction of the Board declared, in addition, that the respondent would not interfere with the rights guaranteed employees in Section 7 of the Act, does not, in our view, alter the situation. Read together in the light most favorable to the respondent, the entire text of the two notices indicated that the respondent would not discriminate against employes because of union membership or interfere with their statutory right to self-organization, but antithetically imported, in addition, that the best interests of the employees would be served if they refrained from union organization. The respondent's emphasis upon direct dealing and the continuation of a past 'happy relationship' in which labor organizations played no part stood out in bold relief against, and in intention and effect substantially nullified, its simultaneous profession of recognition of the right of employees to organize. The employees were aware of the fact that just immediately prior to the posting of the notices the respondent, as found by the Board, had engaged in coercive and discriminatory activity against the Union, in violation of the Act. They knew, too, that the Union was then engaged in a campaign to secure their allegiance. In these circumstances, it cannot be supposed that the employees would overlook or pass off lightly any indication of the respondent's wishes.
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> "In the context of all the circumstances set forth, this notice marked the respondent as a partisan candidate for the allegiance of the employees in opposition to the Union, and constituted a deliberate and forceful effort by the respondent to discourage its employees from membership and activity in the Union. We find,

as did the Trial Examiner, that by posting such a notice the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It should here be pointed out that the Board was in error of fact when it states that just immediately prior to the posting of the notices the Respondent had engaged in coercive and discriminatory activities. Except for the alleged acts which were claimed by the Board to indicate that the Employer preferred the Association to the Union, there were no acts of coercion or discrimination whatever at that time. For instance, the Board, in the same decision (R. 118) affirmatively found that the Employer had not disparaged the Union by engaging in surveillance of union members or leaders or discriminatorily transferred any employee from one position to another, and there is no contention even made by the Board that any one was then discharged.

If the Board was referring to the discharges in the earlier proceeding before it in Case No. C-1995 (Decision and Order, R. 2) it is pointed out that the alleged discharges which there took place were on December 24, 1940 and January 2, 1941 (R. 2). The notices now referred to were posted March 18, 1942 (R. 98) and April 3, 1942 (R. 105).

It cannot be said therefore that any coercive or discriminatory treatment was brought to bear upon any employees either at the time of the notices or for a very long time prior thereto. It is respectfully submitted that if, as is hereafter contended, the Employer had the right of free speech to express its views, merely to the effect that an employee did not have to join the Union in order to retain employment and that whether he did or didn't would not affect his employment—such right of free speech was not unalterably lost merely because over a year prior thereto the Employer was found to have improperly dismissed some employees.

The very same Circuit Court, in the case of *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, CCA (3), 142 F. (2d) 922, answered the same argument in the following manner:

> "The suggestion that we revisit the respondents with the conduct upon which the Board based its findings and order completely ignores the status created by the decree which is the fulcrum of the present proceeding. The Board, having used the Company's prior misconduct as the basis for the order, which the decree enforces, would now have us use the same conduct to give ulterior point to matters occurring since the Company's affirmative submission to the decree which matters, of themselves, are otherwise privileged. If that be permissible, then an employer, once a decree abating unfair labor practice is entered against him, can never again speak or write in expression of his views on labor problems without being hailed before the decreeing court for contempt."

In the case of *National Labor Relations Board v. Ford Motor Co.*, CCA (6), 114 F. (2d) 905, Cert. den. 312 U. S. 689, 61 S. C. 621, 85 L. Ed. 1126, the Court held that the employer had the right to make the statements which he did make derogatory to the Union, notwithstanding the fact that at or a short time prior thereto, the Court also found, unfair labor practices in the way of actual assault and other grievous coercion existed.

The whole question may be summed up in the Board's own view of the matter (R. 100) which was cited and sustained by the Court that the notices "constituted a campaign appeal by the Respondent directed toward defeating the efforts of the Union * * * in the context of all the circumstances set forth, this notice marked the Respondent as a partisan candidate for the allegiance of the employees in opposition to the Union, and constituted a deliberate and forceful effort by the Respondent to discourage its

employees from membership and activity in the Union. We find, as did the Trial Examiner, that by posting such a notice, the Respondent interfered with, instilled and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

What the Board and the Court below really decided was that the notices in themselves were improper and that an employer has no right, by oral or written word, to discourage membership in a Union or, as the Board stated, "to issue a campaign appeal directed toward defeating the efforts of the Union."

In this view it is respectfully submitted that the Court below is in error and that the Employer, if its decision should be sustained, will have suffered a serious interference with his right of free speech to express his opinions as to whether or not the employees either had to join the Union or whether it was best for them to join the Union.

A mere reading of the notices posted by the Employer, whether read separately or together, must lead to the unescapable conclusion that all that the Employer was doing was to remind the employees of the rights which they have at law, namely, to join or not to join the Union, and that their employment would not be affected, whichever way they decided. The reason that the Employer felt obliged to post the additional notices was that the original notice dictated by the Board seemed to overemphasize the right of the employee to join the Union and did not as strongly point out that he did not have to join the Union at all. Therefore, the matter resolves itself into the question as to whether or not the Employer did not have the right to remind the employees that, for a period of twenty-five years, the Company and the employees had had a happy relationship and that it was not necessary for them to join any labor organization, despite anything that they might be told to the contrary.

Holding that the Employer had no right to say that, the Circuit Court not only conflicted with other Circuits,

but clearly departed from its own decision and opinion filed shortly before that by Judge Jones in the case of *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, CCA (3), 142 F. (2d) 922, wherein the Court held that the Employer had the right to make the statements concerning the Union, stating therein (p. 926):

> "It can hardly be questioned that the constitutional guaranty protects the employer and the employee alike. Thus, to make known the facts of a labor dispute has been recognized as a constitutionally protected right of a member of a union. Senn v. Tile Layers Protective Union, 301 U. S. 468, 478, 57 S. Ct. 857, 81 L. Ed. 1229. And, in Misland Steel Products Co. v. National Labor Relations Board, 6 Cir., 113 F. 2d 800, 804, it was appropriately said that 'Unless the right of free speech is enjoyed by employers as well as by employees, the guaranty of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution belong equally to every person.' Again, in National Labor Relations Board v. Lightner Pub. Corporation, 7 Cir., 113 F. 2d 621, 626, the court said that 'obviously the National Labor Relations Board has no authority to interfere with an employer's untrammeled expression of views on any subject.' Cf. National Labor Relations Board v. Sterling Electric Motors, Inc., 9 Cir., 109 F. (2d) 194, 204. For like reason, a court, in enforcing a Labor Board order, lacks any such authority. The decree, therefore, is not to be construed as requiring something which it is beyond our power to direct.
>
> "(5, 6) The Wagner Act does not purport to authorize a restraint upon freedom of speech in any circumstances. 'Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens (persons) by the First Amendment.' See National Labor Relations Board v.

Ford Motor Co., 6 Cir., 114 F. 2d 905, 914, certiorari denied 312 U. S. 689, 61 S. Ct. 621, 85 L. Ed. 1126. Had there been any such provision in the statute, it would have been invalid as in contravention of the First Amendment. Midland Steel Products Co. v. National Labor Relations Board, supra, 113 F. 2d at page 804; National Labor Relations Board v. Union Pacific Stages, Inc., 9 Cir., 99 F. 2d 153, 178. Accordingly, it is our opinion that it was not the intention of Congress in the Labor Act to forbid an employer from expressing opinions as to labor unions or as to anything else so long as his expressions do not constitute, or contribute to, acts or threats of discrimination, coercion, or intimidation in denial of his employees' free and untrammeled exercise of their rights as guaranteed by the Act. Cf. Jefferson Electric Co. v. National Labor Relations Board, 7 Cir., 102 F. 2d 949, 956, quoting from National Labor Relations Board v. Union Pacific Stages, loc. cit. supra."

The decision of the Court below is clearly in conflict with the case of *National Labor Relations Board v. American Tube Bending Co.*, CCA (2), 134 F. (2d) 993, Cert. den. 320 U. S. 768, 88 L. Ed. 41, 64 S. C. 84. In that case, the Court states that the statements there made by the Employer, which more obviously were a campaign appeal directed against the Union, did not constitute an unfair labor practice. Judge Hand, at p. 95, states:

"We shall not go over them in detail; they appear to us to be substantially the same in their general tenor and purport. The respondent professed itself willing to abide loyally by the results of the election, *but did not conceal, though perhaps it made some effort to disguise, its preference for no union whatever.* But there was no intimation of reprisal against those who thought otherwise; quite the opposite. The most that can be gathered from them was an argu-

ment, temperate in form, *that a union would be against the employees' interests as well as the employer's,* and that the continued prosperity of the company depended on going on as they had been. It seems to us extremely undesirable, particularly in so highly charged a subject matter, to draw fine-spun distinctions between two situations so closely alike; any we could make would be insubstantial refinements without real significance; would promote controversy and exacerbate, where the purpose should be to assuage. If there was a basis for finding that such a presentation of the employer's side might be a covert threat to recalcitrants, there was as much basis in the Virginia case. If on the other hand the employer's interest in free speech in the Virginia case was thought to outweigh an actual prejudice to the employees' right of collective bargaining, the employer's interest is the same in the case at bar and the employees' prejudice no greater." (Emphasis supplied.)

The Ninth Circuit Court of Appeals, in the case of *National Labor Relations Board v. Citizen-News Co.*, CCA (9), 134 F. (2d) 970, held that the making of a statement derogatory to a labor union for the purpose of preventing employees from joining it, was not an unfair labor practice, where the employer did not threaten or take action to prevent or coerce its employees, but on the contrary, stated that it would not interfere if employees wished to join the Union.

The fact that the decision of the lower Court is in conflict with the Second Circuit is expressly admitted in the opinion of the lower Court where the Court, in referring to the construction by Judge Hand of the Second Circuit, of the decision of this Court in *NLRB v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. C. 344, 86 L. Ed. 348, states: "We do not so construe the Supreme Court's decision."

Other cases in which Circuit Courts have held that there was no violation of the Act by reason of the employer's statements or notices are:

Greif & Bros. v. National Labor Relations Board, CCA (4), 108 F. (2d) 551, in which an employer's expression of preference for an inside union was not held to be wrongful.

Diamond T Motor Car Co. v. National Labor Relations Board, CCA (7), 119 F. (2d) 978, where a speech, even if expressing a preference for a certain labor organization, was held not to amount to improper influence or coercion.

National Labor Relations Board v. Brown Paper Mill Co., CCA (5), 108 F. (2d) 867, Cert. denied 310 U. S. 651, 84 L. Ed. 1416, 50 S. C. 1104, where the fact appeared that the management stated that it preferred to deal with a local unaffiliated association.

Press Co. v. National Labor Relations Board, 73 App. D. C. 103, 118 F. (2d) 937, Cert. denied 313 U. S. 595, 85 L. Ed. 1548, 61 S. C. 1118, holding that anti-union statements by themselves did not constitute an unfair labor practice.

To the same effect are *National Labor Relations Board v. Union Pacific Stages,* CCA (9), 99 F. (2d) 153; *National Labor Relations Board v. Gutmann & Co.,* CCA (7), 121 F. (2d) 756, and *Midland Steel Products Co. v. National Labor Relations Board,* CCA (6), 113 F. (2d) 800.

B. 2. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With the Applicable Decisions of the Supreme Court.

This Court passed upon the question in the case of *National Labor Relations Board v. Virginia Electric & Power Company,* 314 U. S. 469, 86 L. Ed. 348, 62 S. C. 344. In that case the employer had a history of anti-union activity and it published a bulletin and an official made a speech which were claimed to be derogatory to the efforts of the Union to organization. The notice in that case is

somewhat similar to the notice in the case at bar. But in that case an official of employer also made a speech indicating that if the employees would set up an unaffiliated union it might make it easier to bargain. This Court held that there was no coercion merely through the words used in the speech or notice and that if the Board had based its action upon them alone, apart from the Company's dealings with its employees, it was in error. So isolated, the Court found it difficult to sustain a finding of coercion founded upon them (P. 479 of 314 U. S., P. 349 of 62 S. C.). Accordingly, the Court in that case held that in themselves the notice and speech were not improper. In our case there is likewise no evidence of coercion accompanying the notices. In fact the notices in our case do not constitute nearly as much of a campaign appeal against the Union as the notice did in, for instance, the *American Tube Manufacturing Co.* case, 134 F. (2d) 993, where Judge Hand found that on the basis of this Court's opinion in the *Virginia Electric & Power Co.* case the notice was not objectionable.

The notices used by the petitioner in this case were in no respect either derogatory to the Union or coercive in their effect. They were restrained advisory statements by the employer to his employees giving the employer's judgment as to what would be preferable and also what the rights of employees were. There was no effort to impose upon the judgment or decision of the employees and no twisting of the language can even produce any threat contained therein. Whether the notices constituted a campaign appeal or not, the Employer had the right to say therein what he did say. Otherwise, the result must be the Act precludes employers from exercising their constitutional right of free speech, especially in a case like this where there is nothing either erroneous or wrongful in what was said.

B. 3. The Question Presented Is of Great Public Importance.

The question is of importance, not only because it involves one of the fundamental constitutional rights, namely, that of free speech, but also because of the existing uncertainties, due largely to the conflicting Circuit Court opinions, as to whether or not an employer's freedom of expression was obliterated by the Act. The Employer in this case has had an order entered against him by the Circuit Court because, in a written statement, he reminded the employees of twenty-five years of peaceful relationship and that they were not required either to join or to refrain from joining a union, and that whichever way they chose, it would make no difference in their standing. It seems that it is of great moment for employers and indeed for the public as a whole to know whether or not such expression has become improper.

As counsel reads the opinion of this Court in the *Virginia Electric & Power Co.* case, such expression, unaccompanied by any threats or other coercion, is still not unlawful. However, due to the various interpretations of this Court's opinion, evidenced by the stated dissent in that respect of the Court below from the interpretation by the Circuit Court in the Second Circuit, it is respectfully submitted that the matter should be clarified. It is a question that has arisen frequently and will continue to arise hereafter and according to the present status of the decisions, employers in one Circuit are prohibited from ex pressing their opinions while similar opinions may be uttered in other Circuits.

C. In Addition to the Order to Withhold Recognition, It Was Improper to Order the Employer to Disestablish the Association, Which It Never Recognized, Never Dealt With and Did Not Control.

The conclusions of the Board affirmed by the Court below (R. 111) upon which the Association was condemned are based upon the alleged greater freedom allowed by the Employer to the organizers of the Association to obtain members than allowed to the organizers of the Union.

Secondly, it was alleged that employees who hold some supervisory capacity were active in the Association (R. 113); and

Third, that somehow or other the notices hereinbefore discussed favored the Association above the Union.

In short, all that was found was that between the two, the Employer was not neutral.

It is conceded by the Board (R. 104) that the Association was formed by a group of employees who retained independent counsel for that purpose (R. 103, 104). Nowhere in this record is there any evidence or finding that the Petitioner Employer actually controlled the Association.

Nevertheless, in its decree, the Circuit Court not only ordered the Petitioner to withhold recognition from the Association but also to "completely disestablish the Association." The Petitioner respectfully states that whatever "disestablish" may mean, it is in no position to handle, terminate or otherwise do anything with the Association. The decree already ordered it to withhold recognition. That it can do. The order to disestablish the Association must mean something more. That it cannot do. The Association was not condemned because the Petitioner controlled it. Accordingly, the Petitioner should not be ordered to do something which is beyond its means and for which order there is absolutely no justification in the record. As a matter of fact, unlike other cases, the Petitioner

here never recognized and has never even dealt with the Association. It is as much a stranger to it as to the Union and it is difficult to see how the Board imagines that the Employer can disestablish the Association any more than it could disestablish the Union.

In this respect the Order of the Court below is in conflict with the Ninth Circuit. In the case of *National Labor Relations Board v. Germain Seed & Plant Co.*, CCA (9), 134 F. (2d) 94, the Board found that the employer had dominated an independent union and had even dealt with it; but its dealings had not gone so far as recognition. Accordingly, that Circuit Court held that the Board was wrong in ordering the Employer to disestablish the independent union.

There does not seem to be any decision by the Supreme Court on the subject and in view of the very many cases involving unions which are not to be recognized, it is respectfully represented that this Court should clarify the matter and decide whether the Board has the right to order an employer to do something which is apparently beyond its power.

CONCLUSION.

Accordingly we respectfully urge the Court to grant a Writ of Certiorari in this case. The decision of the lower Court is in conflict with the recent decisions of other Circuits in all phases of the matter herein discussed, namely, the question of jurisdiction, the right of free speech and on the order to disestablish the Association. The subjects are also such as have never been finally determined by this Court except as to the question of free speech; and the decision of this Court in that respect has been interpreted diversely by the different Circuits. The questions all relate to the Act which is an important piece of Federal legislation constantly being interpreted in the Courts. The rights and activities of innumerable persons,

both employers and employees, are governed thereby and the extent of those rights should be clearly adjudicated.

Dated at Atlantic City, New Jersey, October 4, 1944.

Respectfully submitted,

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